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Supreme Court of the United States.

OCTOBER TERM, 1894.

JAMES T. SHIELDS, Jr.,
RECEIVER, ETC.,
APPELLANT,

vs.

JOHN COLEMAN *et al.*

No. 793.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

BRIEF AND ARGUMENT SUBMITTED IN BEHALF OF APPELLANT.

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The Facts.

The original complainant, John Coleman, filed a bill in equity in the Circuit Court at Knoxville, Tennessee, on May 26, 1892, alleging:

1. That the Morristown and Cumberland Gap Railroad Company contracted with Allison, Shafer & Company in 1890 for the construction of 40 miles of railroad, which was practically completed in March, 1892, upon which there was a balance due from the railroad to the contractors of something like $50,000, and that Allison, Shafer & Company have a lien upon the railroad property as security for such balance. (Rec., 2.)

2. That said Coleman and another had contracted with Allison, Shafer & Company to lay and surface the track, by virtue of which the railroad received a benefit, the value of the service rendered being $16,790.70, the balance due having been transferred to complainant. (Rec., 3.)

3. That on April 18, 1892, and within 90 days after the service was rendered, complainant notified the company in writing *that said lien* was claimed by him.

4. That said railroad company is insolvent, and that it owes rights-of-way demands exceeding $50,000, for which suits are pending in the circuit courts of several counties.

That Allison, Shafer & Company are insolvent, but have possession of the railroad, and are operating it under some sort of contract; that the expenses of operation are about equal to the earnings, but that because of the expected increase in travel during the next three months a net income would be realized.

5. That Allison, Shafer & Company are entitled to certain credits, but that after allowing same the balance due would exceed $2,000. The bill is filed on behalf of complainant and all other creditors of the railroad company. (Rec., 4.)

Prayer.

For judgment against Allison, Shafer & Company and declaration of lien on the railroad; for a receiver and satisfaction of demand out of net earnings; for general relief, and for process. (Rec., 6.)

On June 6th, 1892, Frank J. Hoyle was appointed receiver of the railroad and qualified and went into possession. (Rec., 7.)

On June 8th, 1892, the railroad company filed a peti-

tion, tendering bond with approved security in the penalty of $5,000, conditioned to pay such amount as might be found due Coleman, and costs, and the court vacated the decree appointing receiver, who made final report and was discharged, taking receipt of the manager of the road, dated June 9th, 1892, to whom all property in receiver's hands was delivered. (Rec., 8, 12.)

On July 27th, 1892, Allison, Shafer & Company answered, averring that the amount due Coleman was about $3,290.70, and admitting an indebtedness due them from the railroad of exceeding $50,000. (Rec., 13.)

The railroad company answered the same day, denying that it was indebted to Allison, Shafer & Company in any sum, and averring that Allison, Shafer & Company had been largely overpaid, and relying upon the provisions of the act of assembly of Tennessee, chap. 220, acts 1883, passed March 29th, 1883, limiting recovery of subcontractors to actual balance due principal contractors. (Rec., 15.)

The above was the condition of the Record on October 28, 1892, except that several intervening petitions had been filed. (Rec., 19.)

The railway property was all in the custody of that corporation, the order appointing a receiver had been vacated, and no restraining order had been applied for or granted, as against the institution of independent suits against the corporation, and no order had been made sustaining the Coleman bill as a creditor's bill.

On October 28, 1892, Thomas B. Crosby and others filed a general creditor's bill in the Chancery Court of Hamblen County, Tennessee, against said Morristown and Cumberland Gap Railroad Company, the trustee in its general mortgage, the contractors who constructed the road, the claimants against its property who had suits pending upon their several demands, and alleged (Rec., 39–40)—

1. The corporate existence of the railway company, describing its property. (Rec., 41.)

2. That it was organized and promoted by Allison, Shafer & Company, who received as pay for construction its entire capital stock, all bonds issued, and all subsidies.

3. That Allison, Shafer & Company and the railroad had become so blended in the work of construction as to be indistinguishable, and had never maintained the relation of independent contractors. That they were members of the directory of the corporation, employed, paid, and discharged its officers and agents, directed and controlled its affairs as sole owners. C. J. Allison was the chief engineer of construction part of the time, and sole arbiter touching questions arising between the firm and the corporation, while F. H. Allison was at one time vice-president and afterwards president of the corporation.

4. That the corporation never had any paid-up capital, except the subsidy voted by Hamilton County, amounting to $25,000; that all of the capital stock and authorized bonded indebtedness was issued to the firm on account of construction, the firm expecting to deliver portions of the stock thus issued to the several counties and towns in exchange for bonds issued by the subscribing corporations.

5. That the bond issue of $1,000,000, and a stock issue of like amount, were issued to the firm as the work progressed in advance of completion, and were hypothecated for amounts to pay for work of construction, and that unpaid demands against the firm and railroad company, which constitute liens superior to the bonded debt, approximates the value of the road, and will exhaust the property to the exclusion of the bondholders' rights, and to the probable exclusion of that class of creditors whose

demands, though not liens in law upon the property of the road, are superior in point of dignity, under the act of 1877, to the rights of bondholders, and that the railway company, and Allison, Shafer & Company, who were primarily liable for construction demands, are wholly insolvent.

6. The bill describes in detail the judgment demands of the complainant creditors and the general indebtedness of the corporation (Record, pp. 42 to 46 inclusive), and prays (Record, p. 47)—

1. For process.

2. For a restraining order against the bringing of independent suits, and requiring all creditors to intervene in that cause.

3. For the appointment of a temporary receiver.

4. That the restraining order and temporary receivership be made permanent.

5. That the rights and priorities of the creditors be established, and the railroad and its franchises be sold in satisfaction of same.

On the same day an order was made by proper judicial authority granting (Rec., 49)—

1. The temporary restraining order as prayed for.

2. Appointing James T. Shields, Jr., the appellant in this court, temporary receiver of the railroad company and its property.

3. Directing the proper operation of the railway under the orders of the court.

4. Requiring the appearance of the corporation before the Chancellor in open court on November 10, under rule to show cause why the temporary receivership should not be made permanent.

5. Providing for the issuance of writs of possession in the event the receiver's right to possession was resisted.

The bill was filed and the receiver qualified on the same day, taking immediate possession of the property.

On November 12, 1892, in the Circuit Court cause of Coleman *v.* Railroad, the court made an order overruling the demurrer of the railroad company to certain intervening petitions, and sustained the Coleman bill as a general creditor's bill to wind up the affairs of the railroad company, as an insolvent corporation, and directing that all creditors intervene by the second Monday of January, 1893, but allowing pending suits to be prosecuted to judgment; and W. S. Whitney, upon motion of complainants for the restoration of the receivership, was appointed temporary receiver of the railroad and its property, and was ordered to take custody and control of same, and of all property of the railroad company, without bond. Under this order the State court receiver was dispossessed. (Rec., 21.)

On the 29th day of November an amended and supplemental bill was filed, the complainant, John Coleman, and all intervening creditors, who were represented by his solicitors, joining as complainants. This bill recites the allegations of the original bill, and that the additional complainants had intervened by petition, and alleges the execution and existence of the mortgage for one million dollars; that Allison, Shafer & Company were not independent contractors, but an agency of construction; and that the bonds were not in the hands of innocent holders; and prays that the rights and equities of

all parties shall be ascertained and determined and enforced by proper decree. (Rec., 22.)

On January 7th, 1893, the chancellor in the State court ordered James T. Shields, Jr., the receiver of the State court, to intervene in the Federal court, and test and contest the question of jurisdiction, and on January 23d, 1893, James T. Shields, Jr., the receiver of the State court, filed a petition in the United States Circuit Court in the Coleman case, alleging the institution of the Coleman proceeding; the appointment of a receiver; the execution by the railroad company of a bond to pay such judgment as Coleman might recover; the discharge of the receiver and restoration of the property to the corporation; the filing of the creditor's bill in the State court by Crosby and others (cause being entitled Crosby *v.* Railroad); the appointment of said Shields as receiver by the State Court; his custody and possession of the property under such appointment; that such possession had thereafter been wrested from him by Whitney, as receiver of the United States Court; and moved the United States Circuit Court to vacate the order appointing a receiver of said property and to restore the same to the custody and jurisdiction of the State court, and in support of such motion, filed duly-certified copies of the record of the State court proceedings, averring the same to be regular in all respects, and averring that the proceeding in the Federal court was irregular, in that the complainant, Coleman, was not a creditor in contemplation of law, and was not entitled to file a creditor's bill; or that if he had been so entitled, the acceptance of the bond and the discharge of the property from the custody of the United States Court had placed the same where it might be lawfully seized by a court of competent jurisdiction; and being thus lawfully seized and in the custody of such court, it was without power of the United States Court to thereafter repossess itself of the custody of the property without the consent of the court which

had taken custody and jurisdiction of same. (Rec., 51, 54, 56.)

On January 30th, 1893, the Circuit Court overruled this motion and asserted jurisdiction of the administration of the railway company, to which action of the court Shields then excepted.

On February 24, the Circuit Court appointed a permanent receiver. (Rec., 57.)

On March 22d, the Atlantic Trust Company filed its foreclosure bill. (Rec., 58.)

On June 9th, the railroad company answered same.

On January 18th, 1894, the complainant and numerous other parties in the Coleman case sought by petition to procure an order restraining T. Mellon & Sons from prosecuting a separate cause pending in the Chancery Court at Morristown, involving $84,000 worth of steel rails, etc. This petition was dismissed by the court on January 23. (Rec., 68, 73.)

An order was made so enlarging the permanent receivership as to embrace the foreclosure proceedings of the Atlantic Trust Company, which case was consolidated with the Coleman case, and on July 14, 1893, Shields, the State court receiver, filed a petition to vacate that order, and praying that the jurisdiction of the property of the corporation be remanded to the State court, and that the property be delivered to the State court receiver.

On January 31, 1894, Shields, the State court receiver, again moved to vacate the order appointing a temporary receiver and the order appointing a permanent receiver, and assuming jurisdiction of the corporation upon grounds set out in the Record. (Rec., 79–81.)

This motion was overruled and exceptions taken.

On January 31 the Circuit Court pronounced a final decree adjudicating the rights of all parties and ordering sale of the property. From that decree James T. Shields, Jr., receiver, appealed to this court, and assigned error as follows:

I.

That the Circuit Court erred in entertaining jurisdiction under the original bill filed herein by John Coleman as a creditor's bill, because—

(*a*) The complainant's demand had not been reduced to judgment before the filing of said bill.

(*b*) The complainant did not aver an existing indebtedness against the Morristown and Cumberland Gap Railroad Company, and said company was made defendant for the purposes of garnishment, and none other.

(*c*) The bill as filed did not seek to restrain the bringing of independent suits against said railroad company, and such order was not in fact granted.

(*d*) The bill as filed did not bring before said court all parties necessary to the assumption of jurisdiction and the granting of complete relief thereunder as a creditor's bill. Wherefore the order and decree made by said court on November 7, 1892, sustaining said bill as a general creditor's bill was erroneous. (Rec. 155.)

II.

That when the defendant railroad company gave bond, with approved security, on June 8, 1892, to pay such judgment as complainant Coleman might thereafter recover in said cause, said cause became, by operation of law, divested of its character as a creditor's bill, and could not thereafter be prosecuted other than for the sole benefit of the complainants therein, and it was error for the Circuit Court to allow other creditors thereafter to intervene.

III.

That when the Circuit Court, on June 8, 1892, vacated the order appointing a receiver of the property of said railroad company, because of the execution of bond by the said railroad company, with approved security, conditioned to "pay off and discharge the amount which it

may finally appear that the Morristown and Cumberland Gap Railroad Company is liable to complainant by reason of a lien or otherwise," and restored the custody and possession of said property to said railroad company, it, said property, became subject to seizure at the suit of other creditors in such court of competent jurisdiction as might be selected for that purpose, and it was error for said Circuit Court thereafter to appoint, at the instance of said Coleman, a receiver of said property without first exhausting the remedy on said bond. (Rec., 156.)

IV.

That when the Chancery Court of Hamblen County assumed jurisdiction of the property and effects of said Morristown and Cumberland Gap Railroad Company, on October 28, 1892, in said cause entitled Thomas B. Crosby *et al. v.* Morristown and Cumberland Gap Railroad Company *et al.*, and appointed on said last-named day a receiver of the property and effects of said railroad company, and placed said receiver on said last-named day in the custody and possession of same, it was error for said Circuit Court thereafter, on November 12, 1892, to appoint a receiver of the property and effects of said railroad company in this cause, and the jurisdiction then and there asserted and enforced by the Circuit Court and the seizure of the property and effects of said railroad company by the processes of this court and the ousting of said Chancery Court of its jurisdiction and the receiver of said Chancery Court of the possession, custody, and control of the said property and effects of said railroad company, *was* erroneous.

V.

That the motion made and entered by the appellant in the Circuit Court of January 23, 1893, to vacate the orders theretofore made by said court in this cause,

appointing a temporary receiver of the defendant, the Morristown and Cumberland Gap Railroad Company, and for an order restoring the custody and possession of said railroad and its property to this appellant as receiver under the orders and appointment of said Chancery Court of Hamblen County, Tennessee, was well taken and should have been sustained for the reasons assigned and set out in said motion and the petition and records filed in support of same; and the order made by this court on January 30, 1893, overruling and disallowing said motion was erroneous. (Rec., 157.)

VI.

That all decrees made and entered by the Circuit Court after the filing by this appellant of the transcript of the record of the Chancery Court of Hamblen County, Tennessee, in said cause, entitled Thos. B. Crosby *et al. v.* Morristown and Cumberland Gap Railroad Company *et al.* (including the order made by said Chancery Court requiring this appellant to intervene in this cause in the Circuit Court and test and contest the jurisdiction of said court in the premises) were and are erroneous, as and for the reason that the said Chancery Court of Hamblen County, Tennessee, had rightfully acquired jurisdiction of the subject-matter of controversy in said cause, to wit, the property and effects belonging to said defendant, the Morristown and Cumberland Gap Railroad Company, and had rightfully and lawfully committed same to the custody and control of this appellant as the receiver of said Chancery Court in said cause.

VII.

That the Circuit Court erred in entertaining jurisdiction under the bill filed in said court and consolidated with this cause, entitled the Atlantic Trust Company *v.* Morristown and Cumberland Gap Railroad Company.

because the same was filed after the Chancery Court of Hamblen County, Tennessee, had taken full and complete jurisdiction of the property and effects of said defendant, the Morristown and Cumberland Gap Railroad Company, in said cause, entitled Thos. B. Crosby *et al. v.* Morristown and Cumberland Gap Railroad Company *et al.*, and had appointed a receiver of said corporation as an insolvent corporation under a general creditor's bill, and had made and passed an order restraining all creditors of said corporations from bringing suit or seeking to enforce demands against said corporation except in said cause in said Chancery Court. (Rec., 158.)

VIII.

That the Circuit Court erred in the making of the order and decree of January 31, 1894, overruling this appellant's motion to vacate the orders appointing temporary and permanent receivers of said defendant, Morristown and Cumberland Gap Railroad Company, and taking jurisdiction of the administration of the affairs of said corporation as an insolvent corporation, for the reasons set out at length in said decree.

IX.

That the final decree pronounced by the Circuit Court on January 31, 1894, adjudging the rights and priorities of the creditors of said Morristown and Cumberland Gap Railroad Company, and ordering that the property and effects of said railroad company should be sold in satisfaction thereof under decree of said court, was erroneous, in that the Chancery Court of Hamblen County, Tennessee, had theretofore, to wit, on October 28, 1892, acquired full, complete, and exclusive jurisdiction to administer the affairs of said Morristown and Cumberland Gap Railroad Company, as an insolvent corporation, in a proceeding duly instituted for that purpose, having

before said Chancery Court all proper and necessary parties, and, by reason of the premises, the Circuit Court was without the requisite and necessary jurisdiction to lawfully make and enforce its said final decree.

BRIEF.

First Assignment of Error.

It is stated that the original bill is wholly deficient as a creditor's bill in all the essential prerequisites.

a. Complainant's demand had not been reduced to judgment.

Smith *v.* Hurst, 10 Hare, 30;
McDermott *v.* Strong, 4 Johnson's Chancery, 687;
Beach's Modern Equity, Sec. 140;
Scott *v.* Neely, 140 U. S., 106;
Smith *v.* Fort Scott, etc., 99 U. S., 398;
Cates *v.* Allen, 149 U. S., 451;
Hess *v.* Horton, 2 App. Cas. Dist. Col., 81.

b. The Tennessee statute, enlarging the mechanics' lien law so as to protect subcontractors and laborers, was enacted March 29, 1883, chapter 220, acts 1883, page 296, and amended March 11, 1891, chapter 98, acts 1891, page 215.

Section 2 of act 1883 provides that the lien shall be enforced in the Circuit Court of the county and district where the work was done, and that court is the law court in Tennessee.

Sections 3 and 4 of the act of 1883 limit the recovery to the balance in the hands of the contractor or company, the proceeding being in the nature of a garnishment of such balance, which, when fixed, becomes a lien.

The act of 1891 enlarges the remedy so as to create a lien upon the road for the work done and material fur-

nished, without regard to the payments made to the principal contractor, provided certain prescribed notices are given, and also (Sec. 2) enlarges the remedy by providing that the lien may be enforced in either the Circuit or Chancery Court.

No averment was made in Coleman's original bill that Coleman was entitled to a lien. No effort was made to fix a lien on the road, except for the alleged balance due Allison, Shafer & Company, and then it was sought upon the theory of that firm's insolvency, to impound the profits arising from the operation of the road, upon the allegation that the railroad company was likewise insolvent.

c. The original bill avers that many claims were outstanding against the railroad upon which suits were pending in the courts, yet no effort was made to acquire jurisdiction of those parties, nor to restrain the prosecution of those suits, nor to enforce intervention in the Coleman case.

d. The trustee in the mortgage was not made a defendant and would not be bound by the decree of the court, and no complete relief could be granted, nor could perfect title be conveyed, unless the bondholders' rights were adjudged and settled.

Central Trust Company *v.* Bridges (57 Fed. Rep., 753–772).

Second Assignment of Error.

The proceeding instituted by Coleman sought to impound the fund in the hands of the company due to Allison, Shafer & Company, and when a good and sufficient bond was executed, and the custody of the property restored to the company, the bond became substituted for

the property, and the court thereafter pronounced judgment upon the bond.

Coleman's demand was, in fact, discharged by the surety on the bond. (Rec., 101.)

Third Assignment of Error.

It can not be pretended that Coleman was entitled to both the property and the bond, and if the bond was accepted as sufficient, then the property was discharged, and if the property was discharged, then it became subject to seizure at the suit of any creditor. The railroad company could have disposed of the property, and the purchaser would have acquired title, notwithstanding the Coleman suit, for the reason that a bond had been accepted conditioned to pay such demand as Coleman might establish by lien or otherwise.

Fourth Assignment of Error.

It is insisted that when the State court found the Morristown and Cumberland Gap Railroad Company in the undisturbed and peaceable possession of its property on October 28, 1892, it was within the power of that court to seize the property and place its receiver in charge, and that having done so, it was not in the power of the Federal court to review the action of the State court, or to interfere with the custody of its receiver.

State and Federal courts can not lawfully interfere with each other where each is acting within legal limits, and the court having physical custody of the property is the tribunal to determine the question of jurisdiction.

Wilmer *v.* Atlanta, etc., 2 Woods, 409;

Central Trust Company *v.* Chattanooga, etc., 62 Fed. R., 950;